AKITEK TENGGARA SDN BHD

v.

MID VALLEY CITY SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN J
[CIVIL SUIT NO: S2-22-454-1991]
11 MAY 1999

CONTRACT: *Building contract - Termination - Whether lawful - Whether architects' contract properly terminated by developer - Whether there was express or implied right to terminate - Whether project abandoned or aborted - Whether project ongoing - Whether architects entitled to compensation for loss or damage - Contracts Act 1950, s. 74*

CONTRACT: *Building contract - Damages - Unlawful termination by developer - Whether architects entitled to compensation and damages for work done - Whether entitled to loss of profits - Whether can only claim on a quantum meruit*

The 1st defendant ('the defendant') was the owner of several pieces of land ('the said land') and had entered into a joint venture agreement (' the JVA') with the Mayor of Kuala Lumpur to develop the said land into a township ('the project'). By a letter of appointment, the plaintiff was appointed by the defendant as the architect for the project.

Subsequently, the defendant purported to discharge the plaintiff as the architect of the project for the reason that the majority shareholders of the defendant wanted to utilise the services of their own architects. The defendant then wrote to the plaintiff stating that the plaintiff's services were terminated as the project had been aborted.

The plaintiff then brought a claim against the defendant for damages for the wrongful termination of their services in breach of the contract of employment between the plaintiff and the defendant.

Held:

[1] There was no express stipulation in the contract between the plaintiff and the defendant as to the defendant's right to terminate the plaintiff's services. There was also no implied right given to the defendant to terminate the plaintiff's contract if the project was aborted, abandoned or delayed indefinitely.

[2] The termination of the plaintiff's services was unlawful as the plaintiff was not in breach of any of the terms of the contract. The defendant was in breach of the contract and the plaintiff was entitled to compensation for loss or damage pursuant to s. 74 of the Contracts Act 1950.

[3] Since the project as envisaged under the JVA was still subsisting, the defendant had failed to prove entitlement under a *quantum meruit* basis. Consequently, the plaintiff was entitled to sue for all sums due at the time of the breach and for the loss of profits on the work lost by reason of the breach.

[Judgment for the plaintiff.]

Case(s) referred to:
Edwin Hill & Partners v. Leakcliff Properties Ltd (1984) 272 EG 63 ***(foll)***
Sivalingam Periasamy v. Periasamy & Anor [1996] 4 CLJ 545 ***(refd)***
Thomas v. Hammersmith Borough Council [1938] 2 All ER 203 ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 74
Limitation Act 1953, s. 6

Other source(s) referred to:
Hudson's Building & Engineering Contract, 11th edn, vol 1, para 2.260, p 390

For the plaintiff - Manjit Singh (Balvinder Singh with him); M/s Sri Ram & Co
For the defendants - Ong Chee Kwan (Brenda Chong with him); M/s Lee Ong & Kandiah
Watching brief for defendant's shareholders - YM Chin

Reported by Ling Hea Hoon

JUDGMENT

RK Nathan J:

Facts

The 1st defendant was at all material times, the registered proprietor and beneficial owner of all the pieces of land held under GM 755 Lot 19, GM 776 Lots 23 and 25, GM 872 Lot 34, GM 753 Lot 21, all in Section 95A Town of Kuala Lumpur (the said lands).

In 1982 the plaintiff was appointed by one Lim Pak Tow & Sons Realty Sdn Bhd (Lim) to make a submission on its behalf regarding Lots 19 and 21, by submitting plans for the commercial development of the said lots. This was because at that time the relevant authorities had intended to compulsorily acquire the said lots. By a letter dated 2 November 1982 the plaintiff submitted

an application to the Jabatan Perancang for change of use of the land and also for an increase of the population density with the accompanying layout plan for Lots 19 and 21.

By a letter dated 8 November 1982 to Lim the plaintiff set out the terms of his appointment as an architect for the submission of plans for the change of land use and for the increase in density of Lot 19. The terms were as follows:

(a) On submission to Planning Department for change of use and increase in density, the plaintiff would be paid a lump sum fee of RM20,000.

(b) Should the project proceed further requiring the full professional services of the plaintiff, the lump sum fee of RM20,000 would be deemed to be part payment towards the plaintiff's fees of 5% of the total construction costs.

The said Lim then engaged the plaintiff to prepare a comprehensive development plan of a township encompassing the said lands and the surrounding lands which belonged to the State. A comprehensive development proposal was then handed over to the Datuk Bandar together with a letter on 3 November 1982. A formal submission of the proposal was then made to the Datuk Bandar by way of a letter dated 10 January 1983 together with photographs of the architectural model to the original proposal through Lim. Following this, Lim and PW1, a Director of the plaintiff, attended a meeting held at Dewan Bandaraya on 1 April 1983. The minutes of the meeting showed that the Datuk Bandar had agreed to withdraw the Government's intention of acquiring the lands provided *inter alia* a company, namely, the defendant was incorporated and a joint venture agreement was proposed between the Datuk Bandar and the 1st defendant to develop the said lands. The report prepared by the plaintiff was used by Jordan Lee Jaafar Sdn Bhd to prepare their valuation reports which the Datuk Bandar used as a basis for his acquisition of the neighbouring lots. At a meeting held at the Dewan Bandaraya on 8 August 1993 the plaintiff was requested to submit the comprehensive report on behalf of Lim and the Datuk Bandar then agreed in principle to the joint venture contract between the Datuk Bandar and the 1st defendant. By a letter dated 1 September 1983 the plaintiff set out two alternative proposals for the low cost flats to be built on the Government land as requested by the Government at the meeting held on 8 August 1983. At a meeting held at the plaintiff's office on 21 September 1983, Lim then requested the plaintiff to proceed with the preparation of detailed design drawings for the construction of the apartment. By its letter dated 28 September 1983, the plaintiff submitted the layout plans to the Dewan Bandaraya.

The Project

On 1 March 1984 a Joint Venture Agreement (the JVA) was entered into between the Datuk Bandar Kuala Lumpur and the defendant to develop the said lands into a township which then became known as Bandar Syed Putra Project (the Project). After the JVA was signed the Gazette Notification and the compulsory acquisition of Lots 19 and 21 were revoked.

By a letter dated 6 October 1983 the plaintiff then informed Lim that the architect's fee for the said Project was, *inter alia* 5% of the total building costs.

Terms Of The Plaintiff's Appointment

After negotiations, by a letter dated 6 April 1984 from the plaintiff to the defendant, the plaintiff set out the terms of its appointment as the architect for the said project. The plaintiff's fees agreed upon were as follows:

(a) 4% of the total building cost for the first blocks;

(b) 2% of the total building cost for the subsequent repetitive blocks;

(c) 1% of the total infrastructure costs;

(d) RM300 per unit for the medium low and low cost residential units for Dewan Bandaraya; and

(e) RM600 per unit for the medium cost flats for Dewan Bandaraya.

By a letter dated 14 June 1984 the defendant confirmed its acceptance of the appointment and professional fees of the plaintiff as the architect for the said project with the proviso that in the event changes or improvements were required in the subsequent repetitive lots, the fees for the repetitive lots would remain at 2% of the building costs.

The defendant further confirmed the terms of appointment of the plaintiff by signing the letter dated 6 April 1984 from the plaintiff.

Following the execution of the JVA, the plaintiff made a formal submission to complete the works under the schematic design phase, and upon approval proceeded to carry out works under the design development phase and contract document phase and contract management phase as defined in the Conditions of Engagement and Scale of Professional Charges by Persatuan Akitek Malaysia (called "PAM") (hereinafter called "PAM's Regulations").

Termination Of The Plaintiff's Appointment

By a letter dated 1 November 1988 the defendant purported to discharge the plaintiff as the architect for the said project for the reasons that IGB Corporation Berhad (IGB) was as at the date thereof the majority shareholders of the defendant and intended to utilise the services of architects presently retained by IGB Corporation Berhad for the said project.

By a letter dated 26 January 1989 the 1st defendant wrote to the plaintiff stating that the plaintiff's services as the architect for the said project had been "unequivocally and irrevocably terminated" as the said project had been aborted.

The Plaintiff's Case

The plaintiff's suit against the 2nd defendant having been withdrawn, the 1st defendant shall henceforth be referred to as the defendant.

The plaintiff's claim against the defendant is for professional fees and for damages for wrongful termination of the plaintiff's services as an architect, in breach of a contract or agreement between them. The plaintiff's claim in summary is either, (a) for damages for wrongful termination in the sum of RM7,705,382 or alternatively, (b) a sum of RM2,006,373 on the basis of quantum meruit as at the date of termination.

The plaintiff contended that it was engaged as an architect by the defendant in respect of the proposed comprehensive development of Jalan Penghulu Mat, Kampung Haji Abdullah Hukum, Kuala Lumpur pursuant to two letters of appointment, namely:

(a) Letter dated 8 November 1982, and

(b) Letter dated 6 April 1984 and affirmed by the defendant's letter dated 14 June 1984.

The plaintiff argued that its services cannot be terminated unless there is a breach of the express or implied terms of the agreement and for just cause. The agreement cannot be terminated for any other reason and if terminated, the party exercising its right to terminate the agreement will do so in breach thereof and will be liable to pay damages.

The plaintiff contended that in breach of the aforesaid agreement, the defendant, by a letter dated 1 November 1988 purported to discharge the plaintiff as architect of the said project for the reason that the majority shareholders of the defendant intended to use the services of architects then retained by them. Subsequently, contended the plaintiff, by a letter dated 26 January 1989 the defendant based the aforesaid termination on the grounds that the project had been aborted.

Case For The Defendant

The defendant pleaded that its right to terminate the services/contract of the plaintiff was implied by law. It also argued that from the letter of appointment dated 6 April 1984 it was implied that the plaintiff's services may be terminated if the project was aborted, abandoned or delayed. The defendant denied that the plaintiff's termination was wrongful or unlawful and the defendant further denied that it was in breach of the said contract. It also pointed out that from a decision of the then Supreme Court in Civil Appeal No. 02-124-1990 it was implied that the plaintiff's services were terminable and that the termination thereof was correctly made and that the issue of the said termination was *res judicata*. It was also the case of the defendant that it was not in breach of contract for the reason that the said project was delayed indefinitely, abandoned or aborted and accordingly the defendant was not liable in damages. Finally the defendant pleaded that the plaintiff's claim was statute barred by limitation pursuant to s. 6 of the Limitation Act 1953. The defendant thus counterclaimed for a sum of RM131,636.31 which the defendant claimed it had overpaid.

The Claim

The plaintiff therefore claimed:

(a) The sum of RM7,705,382 for wrongful termination of the plaintiff's architectural services in breach of the contract of employment between the plaintiff and the defendant;

(b) Alternatively, judgment for the sum of RM2,006,373 based on quantum meruit;

(c) Interest on the judgment sum at the rate of 8% per annum from the date of unlawful termination, 1 November 1988 to the date of realisation;

(d) Costs; and

(e) Such further and other relief as this court may deem fit and proper.

Findings Of The Court

The Termination

It is clear to me that the employment of the plaintiff as architect for the said project and its professional fees is based on the agreement reached between the parties as contained in the plaintiff's letter dated 6 April 1984 and confirmed by the defendant by its letter dated 14 June 1984. It is also clear that there is no express stipulation as to the defendant's right to terminate the plaintiff's services. Can the defendant therefore terminate the plaintiff's services for the reasons advanced, namely (a) that IGB wanted to retain its own architects and/or, (b) that the project had been aborted?

What is important to note however is that the letter of termination of the plaintiff's services is premised solely on the ground that IGB was at the date thereof the majority shareholder of the defendant and hence intended to utilise the architects on the panel of IGB for the said project. I have been shown no evidence that the project has been abandoned. I find that the defendant's contention that the said project was abandoned was raised for the first time in the letter dated 26 January 1989 from the defendant. In any case this reason is inconsistent with the reason advanced by the defendant in its letter dated 1 November 1988 and from the evidence of DW2, the Project Manager of IGB Corporation Sdn Bhd. I also note that there has been no complaint by the defendant in respect of the services rendered by the plaintiff.

I reject the defendant's reason that IGB being the majority shareholder, intended to use its own architects on the basis that this was never envisaged or agreed to by the parties when terms were agreed upon.

In any case under cross-examination, DW2 clearly admitted that the JVA was not terminated but was varied. He also conceded that it was incorrect to say that the plaintiff's services were terminated because the project was abandoned. He also confirmed that the JVA between the defendant and Dewan Bandaraya Kuala Lumpur was still ongoing.

It is interesting to observe that after the plaintiff was discharged as the architect of the said project, the defendant contended that new amended layout plans and amended building plans were submitted. However, DW2 did not produce any of the alleged new amended layout plans and amended building plans or even a fresh JVA between the defendant, IGB and Dewan Bandaraya Kuala Lumpur. There was not even produced to the court, a new development order. I therefore find that as admitted by DW2, the defendant is still continuing with development of the said project under the existing JVA. Even if the concept of the project had been varied (which I find is not the case) the project nevertheless remains the same and is still ongoing.

It is clear to me that the defendant has been labouring under an erroneous misconception that an alteration or variation of the concept of the development is synonymous with the project being abandoned. In any case DW2 had admitted that the plaintiff's services were terminated not because the project was aborted, but because IGB wanted to use their own architects. He who asserts, proves. The defendant has in my judgment failed to discharge the burden of proving that the project had been abandoned or aborted.

I also find that there is no implied right given to the defendant to terminate the plaintiff's contract if the project is aborted, abandoned or delayed indefinitely. The term relating to this aspect merely states that if this happens the fees computed to the nearest stage of work is payable.

In the circumstances, it is my finding that the termination of the plaintiff by the defendant was indeed unlawful as the plaintiff was not in breach of any of the terms of the contract. Accordingly I find that the defendant is in breach of the contract and the plaintiff is entitled to compensation for loss or damage against the defendant pursuant to s. 74 of the Contracts Act 1950 which reads as follows:

> 74. Compensation for loss or damage caused by breach of contract.
>
> (1) When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract to be likely to result from the breach of it.
>
> (2) Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.
>
> Compensation for failure to discharge obligation resembling those created by contract.
>
> (3) When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default as if the person had contracted to discharge it and had broken his contract.

Damages

In *Thomas v. Hammersmith Borough Council* [1938] 2 All ER 203 the Court of Appeal held that unless there is an agreement to the contrary, an appointment in explicit, and unqualified terms for a particular project cannot be determined until the purpose for the appointment has been achieved. However, in the event of clear agreement as to the purpose of the appointment any termination of the employment before the purpose of the appointment has been achieved, would amount to a breach of contract.

In *Edwin Hill & Partners v. Leak Cliffe Properties Ltd & Anor* 29 BLR 43 the court held that the absence of a contractual right to terminate the engagement prior to completion of the services or the project means that the contract is in the nature of an entire contract. The court also rejected the defendant's argument that the right to terminate was to be implied. Such an argument failed because the parties had expressly dealt with what was to happen if the defendant was unable to proceed and had not made any arrangements for any other termination.

In the light of these cases, is the plaintiff entitled to compensation and damages for work done to date of termination and the loss of net profits on the abandoned work or uncompleted services lost by reason of the aforesaid breach after deducting therefrom the cost to the plaintiff for providing the uncompleted services for the abandoned works or as pleaded in the alternative is the plaintiff entitled to treat the contract as at an end and sue upon a quantum meruit basis only?

I find that on the basis of *Edwin Hill* when a contract of employment between the owner and the architect has been partly performed and there is a refusal or failure of the building owner to complete the project amounting to a repudiation on his part, the architect can, on general principle, sue for all sums due at the time. Alternatively, the plaintiff may treat the contract as at an end and is entitled to the damages based on the principle of quantum meruit (see *Hudson's Building & Engineering Contract*, 11th edn, vol 1, para. 2.260 p. 390).

However, the question remains whether the plaintiff is entitled to sue on the "entire contract" or on "quantum meruit".

I had earlier held that neither has the project been aborted, abandoned nor delayed indefinitely. This is based on the admission of DW2 himself. The provision relating to payment of compensation where there is abortion, or abandonment of work or indefinite delay stipulates that upon such occurrence, then the fees computed to the nearest stage of work is payable. It is for the defendant to bring its case within this provision if it wishes to submit that the plaintiff is entitled only to a quantum meruit basis. But as I have held since I have found that the project as envisaged in the earlier JVA is still subsisting the defendant has failed to prove entitlement only under a quantum meruit basis.

This is a clear case of wanton cancellation of the contract by the defendant purely on the basis that it wished to utilise its own architects. I therefore hold that the plaintiff is entitled to sue for all sums due at the time of the breach and for the loss of profits on the work lost by reason of the breach.

I also find that the plaintiff's evidence in respect of particulars of loss and damage suffered by it as a result of its unlawful termination by the defendant in breach of the contract has not been seriously challenged in cross-examination by the defendant. The defendant solely relied on the evidence of DW2, one Sze To, and their architect.

In *Sivalingam a/l Periasamy v. Periasamy & Anor* [1996] 4 CLJ 545; [1995] 3 MLJ 395 the Court of Appeal commented on the need to put one's case to the other side in cross-examination. The details of loss and damage suffered by the plaintiff is set out in agreed Bundle E.

The Probative Value Of DW3 And His Report

I reject the evidence of DW3. I find him a biased witness with a lop-sided view of assessment of the fees payable to the plaintiff. I find that his entire report and evidence in court is premised on the basis that the defendant's termination of the plaintiff's contract was valid. Clouded by his own views of righteousness he made no allowance for any fees or damages payable to the plaintiff in the event that the termination was unlawful to assist the court to calculate the loss of profits of the abandoned works or uncompleted services in respect of the whole project from the date of the termination to the conclusion of the project. I also find that his entire report is based on information and documents given to him by the defendant and he never gave himself the benefit of any independent research or assessment. I would have thought that as between professionals of a similar trade DW3 would have at least discussed the computation of the fees with the plaintiff by assessing from the plaintiff the total work done and the plaintiff's view of the fees payable to him.

His assessment is arbitrary and based on erroneous data and information. For instance:

(i) He has only considered a figure of 28% instead of 30% for the full fees for the Schematic Phase, Design Development Phase and Contract Documentation Phase.

(ii) He has not provided for fees for the Schematic Design Stage for all the blocks. Instead, he has erroneously relied on the sum of RM20,000 being the fees for the total fees in respect of this stage based on his interpretation of the letter dated 8 November 1992 at 1 CABD 26 and what he was told by the defendant when clearly this letter is confined to the fee of RM20,000 being the initial submission to the Planning Department for change of use and increase in density.

(iii) His evidence is based on a total cost of RM19.2 million being the lower figure instead of on the 3rd Cost Plan for the increased cost for a 27-storey building with additional seven items. The 3rd Cost Plan is to be found at 8 CABD 2465.

(v) He has also computed the fees based on the cost of a 4-storey building instead of a 5-storey building in respect of Blocks 17-22.

I find that he was not candid. Initially he informed the court that the Schematic Design Phase ended after the issuance of the development order. After being referred to PAM's definition of Schematic Design Phase, DW3 agreed that the Schematic Design Phase ended upon the submission of the application for planning approval. In this case, the plaintiff submitted the application for planning approval by letter dated 19 June 1984 which was approved by Dewan Bandaraya Kuala Lumpur on 1 December 1984 and the development order for Phase 1 comprising of Blocks 1, 5, 7 and 8 was granted on 1 December 1984 and for Blocks 17-22 was granted on 28 May 1986.

DW3 has admitted in his evidence as follows:

(i) That the drawings had reached design development stage and building plans had been submitted to Dewan Bandaraya Kuala Lumpur although he had no records of their approval.

(ii) That the letter from the plaintiff with regards to the fee of RM20,000 is in respect of Lot 19 only.

(iii) That he had not provided for any fees for schematic design or layout approval.

(iv) That his assessment of full fees for Schematic Phase is based on 1 CABD 328-330.

In the circumstances, I find for the plaintiff as follows:

(a) Agreed fees at 4% of total building cost of First Blocks (Blocks 1, 7, 11, 15, 16 and 18) (4% of RM114,840,200.00)		RM4,593.608.00
(b) Agreed fees at 2% of total building cost of Repetitive Blocks (Blocks 2, 3, 8, 9, 10, 12, 13, 14, 17, 19, 20, 21 and 22) (2% of RM214,344,000.00)		RM4,286,880.00
(c) Agreed fees for Bandaraya units:		
(i) 284 units medium cost RM660.00 per unit (Block 4)	RM170,400.00	

(ii) 45 units medium low cost at RM300.00 per unit (Block 5)	RM13,500.00	
(iii) 396 units low cost at RM300.00 per unit (Block 6)	RM118,800.00	
(iv) 45 units medium low cost at RM300.00 per unit (Block 23)	RM13,500.00	RM316,200.00
(d) Agreed fees of 1% of total infrastructure costs (1% of RM28,000,000.00)		RM280,000.00
Total architect's fees		RM9,476,688.00
Less:		
(a) Architectural cost of remaining works at date of termination		RM1,141,306.00
(b) Amount paid to date by 1st defendant		RM630,000.00
Loss suffered		RM7,705,382.00

I also award interest at the rate of 4% per annum from 1 November 1988, that is the date of unlawful termination to date of judgment and costs.

Having made this finding it follows that the defendant's claim to overpayment of RM121,667.20 is unfounded and is thus dismissed with costs.